IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO. 66 OF 2004.

1. Shri Gokuldas Rama Gaude,
   aged 35 years, residing at
   House No. 61/1, Sonshi,
   Post Honda, Sattari, Goa.
2. Shri Bhanu Rama Gaude,
   aged 48 years, residing at
   House No. 61/1, Sonshi,
   Post Honda, Sattari, Goa.
3. Smt. Meena Bhanu Gaude,
   aged 40 years, residing at
   House No.61/1, Sonshi,
   Post Honda, Sattari, Goa.
4. Shri Ashok Rama Gaude,
   aged 30 years, residing at
   House No.61/1, Sonshi,
   Post Honda, Sattari, Goa. .... Appellants.

Versus

M/s. V. G. Quenim,
A Proprietary concern of
Shri Vasudev Guiri Keni,
of major age,
residing at Miramar, Panaji, Goa. .... Respondents.

Shri S.N. Joshi and Ms. Reshma Kamat, Advocates for the Appellants.

Shri V.B. Nadkarni, Senior Advocate with Shri Y.V. Nadkarni, Advocate for the Respondents.

CORAM: B. H. MARLAPALLE &
N. A. BRITTO, JJ.

DATE: 2nd NOVEMBER, 2004.

JUDGMENT (PER BRITTO, J.)

This is defendants' appeal filed against the Judgment/Decree dated 29.12.2003 of the learned Civil Judge, Senior Division, at Bicholim

decreeing the suit of the plaintiff for specific performance of Agreement dated 5.7.1996 for sale of the property surveyed under No.50/1 of ' Sonus Vonvoliem' along with houses existing therein bearing V.P. House Nos.61/1, 61/2 and 61/3 along with their appurtenances.

2. The parties hereto shall be referred to in the names as they appear in the cause title of the said Civil Suit.

3. There is no dispute that the defendants by Deed dated 6.10.1995 had purchased four properties from Jesus Venceslau Antonio Santano Mesquita Botelho bearing Survey Nos.40/1, 41/3, 48/1 and 50/1 of village ' Sonus-Vonvoliem'. The plaintiff had a mining lease bearing No. T.C. 16 dated 26.4.1990 and the said properties were included within the said mining lease. By an Agreement dated 5.7.1996 the defendants agreed to sell to the plaintiff the said properties for Rs.14,69,175/- and with the said houses and appurtenances like cattle sheds, firewood sheds, etc. for Rs.10,00,000/-. In terms of the said Agreement the defendants also agreed to sell and hand over vacant possession of the land of survey Nos.40/1, 41/3 and 48/1 immediately after the said agreement and as far as survey No.50/1 was concerned, they agreed to sell the same on or before 31.12.1998.

4. There was a suit filed by the plaintiff against the defendant No.1, being R.C.S. No.20/1995 before the Court of Civil Judge S.D. at Sattari. The said suit was amicably settled as per the consent decree dated 30.7.1996 and as per the said consent decree the plaintiff agreed to purchase from the said defendants

and his other family members the said properties having survey Nos.40/1, 41/3, 48/1 and 50/1 of the said village ' Sonus-Vonvoliem' as per Agreement dated 5.7.1996 and it was also agreed that the said defendant would not obstruct the plaintiff from carrying out mining activities in the said property surveyed under Nos.40/1, 41/3 and 48/1 and the defendants undertook to deliver vacant possession of the property surveyed under No.50/1 on or before 12.12.1998.

5. The plaintiff stated that inspite of the said decree and several requests from the plaintiff to the defendants, the defendants did not execute the Sale Deed in respect of Survey No.50/1.

6. As far as survey No.40/1, 41/3 and 48/1 were concerned, Sale deeds in respect of the same were executed on 12.7.96, 13.7.96 and 15.7.96 which were duly registered in the Office of Sub-Registrar of Sattari at Valpoi. But as far as Survey No.50/1 is concerned, it was the case of the plaintiff that the defendants on one pretext or the other, delayed the execution of the same and therefore on 22.11.01 the plaintiff sent a lawyer's notice to the defendants calling upon the defendants to execute the necessary Sale Deed in respect of the said property surveyed under No.50/1 with houses and structures mentioned in the Agreement in favour of the plaintiff within fifteen days. The plaintiff stated that the defendants sent a reply through their lawyer stating that their signatures on the Agreement were obtained by misrepresentation and that they would refund the amount paid to them by the plaintiff after deducting the damages towards the loss of crop and that the said Agreement dated 5.7.1996 should be cancelled.

7. The plaintiff stated that the northern and eastern boundaries of Survey No.50/1 is a nulla and the plaintiff wanted urgently to construct an earthern bund by the side of the said nulla before the monsoon of June, 2002 to prevent the mining silt going in the said nulla and also to use the said bund as a road for mining purposes, but the defendants had threatened the plaintiff that thy would not allow the plaintiff to use the said area for mining purposes. The plaintiff therefore filed the suit for specific performance of the said Agreement dated 5.7.1996 and for permanent injunction.

8. The defendants contested the suit and stated that under pressure from the police and ignorance of law, the defendants had executed the said Agreement dated 5.7.1996 and that the suit filed by the plaintiff against the said defendants was also settled in terms of the said Agreement and unfortunately the defendants did not get effective legal assistance and had they got effective legal assistance the Agreement dated 5.7.1996 and the Sale Deeds dated 12.7.96, 13.7.96 and 15.7.96 would never have been executed. The defendants stated that the said Agreement dated 5.7.96 was not executed out of their own free will and that they always conveyed to the plaintiff that they were not in a position to surrender their rights in respect of the property surveyed under No.50/1. The defendants also stated that the amount which they received was much less than the price the defendants would have normally got. The defendants stated that the property surveyed under No.50/1 is their lifeline where they have been living for generations and where they are engaged in their traditional occupation of cattle rearing and therefore it was impossible for them to sell and

dispose of the said property. The defendants also stated that the Agreement dated 5.7.96 was a fraud played on them by the plaintiff and therefore they are unable to execute the Sale Deed in respect of Survey No.50/1. The defendants stated that they had every right to refuse to sell the property surveyed under No.50/1 as well as to obstruct the plaintiff from constructing the bund-cum-road in the said property or from using the said property for mining purposes.

9. The learned Trial Court framed two issues and thereafter the plaintiff examined his Attorney who produced the Agreement of Sale dated 5.7.96, the sale deeds already executed in respect of three sub-divisions and the compromise decree dated 30.7.96, among other documents. The defendants examined defendant no.1 and two other witnesses and upon consideration of the evidence led by both the parties, the learned Trial Court came to the conclusion that as per the Agreement of Sale dated 5.7.96-Exh.PW.1/C there was a clear mention that there were six mundcarial houses in the suit property and an area of 300 sq.m. for each house was agreed to be left out from the sale and the plaintiff was required to deal with the said mundcars separately. The learned Trial Court also came to the conclusion, and in our view rightly, that the defendants had failed to prove that the agreement dated 5.7.96 was signed out of coercion or undue influence inasmuch as the consent decree was signed before the Court on 30.7.96 and no allegation of any coercion was made at any time thereafter until the filing of the present suit. The learned Trial Court rightly concluded that the version of D.W.2 Raikar that the property was not conveyed because they could not get 'prasad' was not only not supported by the defendant no.1 but was otherwise a totally different stand taken by him.

10. At the time of arguments before this Court, Shri Joshi, the learned Advocate of the defendants placed reliance on Section 20 of the Specific Relief Act, 1963 and has submitted that the learned Trial Court has not at all considered the hardships which the defendants are facing whilst granting the decree of specific performance in favour of the plaintiff. Shri Joshi has submitted that at present there is no mining activity going on in the disputed land of survey No.50/1 inasmuch as the defendants are also unable to get alternate land elsewhere at a price they agreed and sold their land. Shri Joshi has placed reliance on several decided cases to support his submissions.

11. On the other hand, Shri Nadkarni, the learned Senior Counsel on behalf of the plaintiff has submitted that specific performance is a rule and not an exception. Shri Nadkarni has also submitted that the equities are in favour of the plaintiff. Shri Nadkarni has also submitted that the evidence led by the defendants is at variance with the pleas taken by them.

12. Section 20 of the Specific Relief Act, 1963 deals with discretion as to decreeing specific performance. Sub-Section (1) of Section 20 provides that where the jurisdiction to decree specific performance is discretionary, and the court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal. Sub-Section (2) of Section 20 provides that the following are cases in which the court may properly exercise discretion not to decree specific performance:-

(a) where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant; or

(b) where the performance of the contract would involve some hardships on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff; or

© where the defendant entered into the contract under circumstances which though not rendering the contract voidable, makes it inequitable to enforce specific performance.

13. In the case of **Prakash Chandra v. Angadlal and Others [(1979) 4 S.C.C. 393]** the Supreme Court has held that the ordinary rule is that specific performance should be granted. It ought to be denied only when equitable considerations point to its refusal and the circumstances show that damages would constitute an adequate relief. In the case of **Parakkkkkunnan Veetill Joseph's Son Mathew v. Nedumbara Kuruviia's Son and others (A.I.R. 1987 S.C. 2328)** the Supreme Court reiterated the principle underlying Section 20 of the Specific Relief Act, 1963 and stated that the said section preserves judicial discretion to Courts as to decreeing specific performance. The Court should meticulously consider all facts and circumstances of the case. The court is not bound to grant specific performance merely because it is lawful to do so. The motive behind the litigation should also enter into the judicial verdict. The court should take care to see that it is not used as an instrument of oppression to have an unfair advantage to the plaintiff.

14. In the case of **A.C. Arulappan v. Smt. Ahalya Naik (A.I.R. 2001 S.C. 2783)** the Supreme Court has stated that certain circumstances have been mentioned in Section 20(2) of the Specific Relief Act, 1963 as to under what circumstances the court shall exercise such discretion. If under the terms of the contract the plaintiff gets an unfair advantage over the defendant, the court may not exercise its discretion in favour of the plaintiff. So also, specific relief may not be granted if the defendant would be put to undue hardship which he did not foresee at the time of agreement. If it is inequitable to grant specific relief, then also the Court would desist from granting a decree to the plaintiff.

15. In our opinion, the findings of the learned Trial Court in decreeing the suit for specific performance in terms of the Agreement dated 5.7.96 cannot be faulted. The defendants had not only entered into the said Agreement dated 5.7.96 for the sale of the said properties to the plaintiff, but subsequently had also agreed to sell the same in R.C.S. No.20/95 before the Court of Civil Judge J.D. at Sattari and thereafter there was no whisper from the defendants that they had executed the said Agreement under coercion until the filing of the written statement which shows that the plea of coercion was taken by the defendants as an afterthought and only with a view to find an excuse not to execute the Sale Deed in terms of the said Agreement. The consent decree passed in the said Civil Suit is in full force and effect. The learned Trial Judge rightly held that the Agreement dated 5.7.96 was not proved by the defendants to have been executed under coercion or undue influence and what is to be

noted is that all along the defendants did have legal advice when they executed the said document. In our opinion there were no equitable considerations at all in favour of the defendants for the learned trial Court to have refused specific performance. It has been submitted on behalf of the plaintiff that although the mining lease was not under operation at the time of recording the evidence of the Plaintiff, the operation of the same depends on demand of ore. Regarding the plea that the disputed property is the lifeline of the defendants, the defendants led no evidence to show that the disputed property was yielding any income to the defendants and in fact it has been rightly concluded by the learned Trial Court that the occupation of defendant No.1 was that of Driver. Another submission made at the time of hearing by learned Advocate Shri Joshi is that the defendants are unable to get another property for the value they have received on account of the sale of the suit properties. This submission is difficult to be accepted, apart from the fact that no evidence on that aspect was also led by the defendants. Shri Joshi made yet another submission that the properties were tenanted. In fact, D.W.1 did not even remember at what price he had purchased the said properties from Mr. Botelho nor he could reply to the question as to why they had purchased the said properties from him in case the said properties could have been purchased by them under the Agricultural Tenancy Act, 1964. The defendants having agreed to sell all the four properties and having sold three of them now cannot be allowed to say that the fourth property could not be sold by them because it could not be used otherwise than for agriculture. As already stated, the defendants led no evidence to show that any of the properties were actually being used for agriculture by them and on the contrary the Defendants had

impliedly admitted that the said properties were damaged on account of mining activities.

16. In view of the above, we find that there is no merit in this appeal. Consequently, the same is hereby dismissed with costs.

B. H. MARLAPALLE, J.

N. A. BRITTO, J.

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